NOS. 07-21 & 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,
PETITIONERS,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,
RESPONDENTS.

INDIANA DEMOCRATIC PARTY, *ET AL.*,
PETITIONERS,

v.

TODD ROKITA, *ET AL.*,
RESPONDENTS.

On Writs of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF PETITIONERS

[PHOTO ID LAW VIOLATES PRIVACY]

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INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC has participated as *amici* in several cases before this Court and other courts concerning privacy issues, new technologies, and Constitutional interests, including *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*; 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. In accordance with Rule 37.6 it is stated that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. EPIC Associate Director and Coordinator of the National Committee for Voting Integrity Lillie Coney assisted in the preparation of this brief.

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SUMMARY OF THE ARGUMENT

The Indiana statute does not remedy the risk of voter fraud, but mandating presentation of state-issued documents as a condition to the exercise of the right to vote—unquestionably the most fundamental of all democratic freedoms[2]—is a sharp departure from national precedent and raises unique privacy and security concerns. Other *amici* have noted that race, politics and religion often drive the deployment of ID cards, a concern shared by EPIC.[3] However, this brief addresses the specific privacy and security concerns that arise from the Indiana voter ID law.

First, the Indiana law ostensibly seeks to address the problem of voter fraud through the

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[2] "Other rights—even the most basic—are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

[3] Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006) In Rwanda, despite protests from non-governmental organizations several years prior to the genocide, official identification cards contained ethnic information. The classification system was a remnant from the Belgian colonial government, and was extensively used to identify victims to be killed. To have the word "Tutsi" on an identification card was a death sentence. During the Holocaust, Nazi Germany placed a "J-stamp" on the identification cards of all Jews. Requiring citizens to present non-voting-related documents, such as a driver's license, at voting polls or should they not own one, requiring them to disclose to the state their reason for non-compliance (which can include religious beliefs) is akin to demanding citizens to present government-issued food-rationing cards for unrelated purposes, a practice that prompted rebellion in World War II Britain. EPIC & Privacy Int'l, PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS(EPIC 2006) 23 (EPIC 2006).

establishment of photo requirement at the polling place, yet leaves open the ongoing risk of fraud made possible by absentee voting. As a matter of logic, the identification requirement is flawed. Second, the state voter ID law will almost certainly rely upon the federally mandated REAL ID, a controversial system of identification that will introduce additional privacy and security risks.

ARGUMENT

I. The Indiana Voter ID System Is Flawed And Does Not Ensure That Eligible Voters Will Be Allowed To Vote Or That Ineligible Voters Will Be Prevented From Voting

Any identification system will involve multiple layers of complex and interdependent systems that must work well when joined for the purpose of determining eligibility to vote. IDs—NOT THAT EASY QUESTIONS ABOUT NATIONWIDE IDENTITY SYSTEMS (Steven T. Kent & Lynette I. Millett eds, National Research Council 2002). The success or failure of such a system is not just dependent on the individual components, but on how well they each work in tandem. Voting is a large complex security challenge that requires an end-to-end concern for security from the voter registration process through the vote casting and tabulation phase. *Hearing on the Relative Merits of Openness in Voting Systems Before the Elections Comm. of the Calif. S.* (Feb. 8, 2006) (testimony of Peter G. Neumann, Principal Scientist, Computer Science

Lab, SRI International).[4] Although the proposal is for a statewide system of identification limited to those who have registered to vote, the implementation for this system would have to follow the same process as any successful identification system.

A. Dissenting Opinion In The Seventh Circuit Court Of Appeals Decision Correctly Notes Many Circumstances (Recent Marriage, Misspellings) Where Eligible Voters May Be Improperly Denied Right To Vote

The errors that will be found in Indiana's proposed voter identification system could occur at any point in the process of collecting, storing and sharing data. Ass'n for Computing Mach., Pub. Policy Comm., *Statewide Databases of Registered Voters: Study of Accuracy, Privacy, Usability, Security, and Reliability Issues* (2006).[5] It is important that if the state of Indiana continues to rely upon voter registration records, that it develops data quality control protocols to improve the accuracy and reliability of this information.

Voters in the state of Indiana faced the prospects of being denied the right to vote because they were unsure if their voter registration efforts had been successful. Election Incident Reporting System, Indiana, Voter Registration (2004).[6] A

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[4] *Available at* http://www.csl.sri.com/neumann/calsen06.pdf.

[5] *Available at* http://www.acm.org/usacm/PDF/VRD_report.pdf.

[6] *Available at* http://www.voteprotect.org/index.php?display=EIRMapState

2004 report found that voters expressed confusion regarding the rules that govern voter registration in several key areas: changes of address within or among counties and/or states, registration deadlines prior to elections, rules that bar registration, *i.e.* felony convictions or college student enrollment, requirements for possession of voter registration document, removal from registration rolls between primary and general elections in 2004, and routine voter participation requirements for continued registration. *Id.*

There may be other reasons for multiple registrations, which include poor record keeping on the part of the state or local governments, as was the case in Marion County, Indiana. Editorial, *Too Close to Election to Purge Voter Roles*, INDIANAPOLIS STAR, Aug. 27, 2004.

B. Discretion Is Still Left With Poll Workers To Make Determinations As To Match Between Identity Card And Registration Record

The Indiana statute would require all citizens presenting themselves at the poll—the vast majority of whom presumably arouse no suspicion—to disclose not only their names but also all information that appears on their identification cards. Further, the Indiana statute would require citizens to present the cards not to police but to poll workers, most of whom are neither professionally licensed in law enforcement nor permanent governmental employees. Todd Rokita, Ind. Sec'y of

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&tab=ED01&state=Indiana&cat=06&start_date=&start_time=00%3A00&end_date=&end_time=00%3A00&search=, 2004.

State, Poll Worker Training Materials ("Indiana Poll Worker Materials").[7] The state of Indiana and local election offices are experiencing great difficulty in recruiting and retaining poll workers. Todd Rokita, Ind. Sec'y of State, Poll Worker Shortages: Could Students Be the Answer?[8] The process for poll worker training has become much more important because of the need to get the process right the first time. State of Ind., *Want to Be a Poll Worker?*[9] In that training, available on the Secretary of State's Web site, examples of acceptable and unacceptable forms of identification are given. Notably, the only two people identifiable as ethnic minorities appear on "unacceptable" photo identification. Todd Rokita, Ind. Sec'y of State, 2007 Photo ID Card Examples ("Indiana ID Examples").[10] It would have been preferable if the types of identification presented included no photographs of people. *Id.* The way that gender, age, race, and ethnicity are emphasized by photo identification, along with the state's desire to collect religious affiliation from some of those who would abstain from providing a photo ID leaves open the specter of "arbitrary and capricious" enforcement. *Chevron U.S.A., Inc. v. Natural Res.*

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[7] *Available at* http://www.in.gov/sos/elections/hava/pollworkertraining.html.

[8] *Available at* http://www.in.gov/sos/elections/hava/pdf/HSHD_LTE.pdf.

[9] *Available at* http://www.in.gov/sos/elections/hava/pdf/PollWorkerBrochure.pdf.

[10] *Available at* http://www.in.gov/sos/elections/hava/pdf/2007%20Photo%20ID%20Card%20Examples.pdf.

Def. Council, Inc., 467 U.S. 837, 845 (1984) The importance of the documents presented is the textual information provided and where to locate that relevant information on the face of the document. While the government generally has no right to interfere with the prejudices and discriminatory practices of individuals, it has not only the right but also the duty to make sure that these practices aren't given the imprimatur of the state. Anita L. Allen, PRIVACY LAW AND SOCIETY (Thomson West 2007).

The state of Indiana's attempt to educate poll workers on the forms of vote identification that are acceptable and unacceptable may have also indicated a flaw in its own rationale about which voters are threats to the democratic process. Indiana ID Examples. Poll workers provide the human judgment used in a gatekeeper function to determine who may vote in public elections. Those voters, whom poll workers do not know personally, often find the hurdles to voting are much higher. Spencer Overton, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 161-62 (W.W. Norton 2006). The subjective nature of the polling operation coupled with the voluntary nature of poll work raises the likelihood of errors by well-meaning people who are not equipped or trained to perform the functions outlined by the new law. Indiana Poll Worker Materials.

C. Absentee Voters Are Eligible To Vote Without Presenting Voter ID And There Is No Way To Assure That Eligible Voters Cast Absentee Votes;

Perfecting Voter Identification Means Eliminating Absentee Voting

The biggest opportunity for rampant voter fraud is absentee ballots.[11] In 2003, a town judge primary election was overturned when a Lake Superior Court judge found that the election outcome was tainted by fraudulent absentee votes. Michael Puente, *Charges in S'ville Judge Race Expected*, POST-TRIBUNE (Merrilville, Ind.), Nov. 18, 2003.

While the state of Indiana has raised the barrier to in-person voter participation through the new photo ID requirement, it has left the gate wide open on actual voter fraud threats posed by absentee voting.[12]

There are also concerns about people without the capacity to cast an independent, and informed vote i.e. those in assisted living or nursing homes, those who suffer from Alzheimer's disease who may have absentee ballots cast in their names. Todd Rokita, Ind. Sec'y of State, Absentee Ballot Long

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[11] Maria A. Morales, Karen Branch & David Lyons, *Carollo Headed Back to Court, Commissioners Don't Act to Fill Mayor's Seat*, MIAMI HERALD, Mar. 6, 1998, at 1A (documenting the confusion caused when a judge calls a new election due to massive absentee voter fraud).

[12] Todd Rokita, Ind. Sec'y of State, Absentee Balloting, Absentee Balloting, http://www.in.gov/sos/elections/hava/absentee.html; Todd Rokita, Ind. Sec'y of State, Importance of Absentee Voting, http://www.in.gov/sos/press/old/101703_oped.pdf; Todd Rokita, Ind. Sec'y of State, Qualifications for Absentee Voting, http://www.in.gov/sos/press/old/101603.pdf; Todd Rokita, Ind. Sec'y of State, Military & Overseas Voter Guide, http://www.in.gov/sos/elections/pdfs/overseas.pdf.

Term Care Facilities Common Questions & Answers.[13]

Whatever solutions may exist to the problem of fraud in absentee balloting, it is clear that the state of Indiana has not addressed this actual problem, instead choosing to burden voters who chose to cast their votes at a public polling place.[14]

II. Indiana Voter ID Scheme Will Be Based On The Flawed REAL ID System

The Indiana voter ID law now before this Court anticipates the implementation of a controversial federal identification law, known as "REAL ID." Because the residents of Indiana will likely be required to obtain a REAL ID to participate in elections in the state of Indiana and because that particular identification scheme has been subject to substantial scrutiny by technical experts and legal scholars, *amici* EPIC explain in this section the problems with the REAL ID system as the basis for voter identification under the Indiana state law.

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[13] *Available at* http://www.in.gov/sos/pdfs/Nursing_Home_FAQ.pdf.

[14] There are ongoing efforts by technologists to develop better models for conducting more private, secure, and reliable balloting methods for public elections. One method that has many of the features necessary for a public election is Punchscan. David Chaum, Punchscan, Voting Method, http://punchscan.org/. *See also*, Ronald L. Rivest, Warren D. Smith, *Three Voting Protocols: ThreeBallot, VAV, and Twin* (2007), *available at* http://people.csail.mit.edu/rivest/RivestSmith-ThreeVotingProtocolsThreeBallotVAVAndTwin.pdf.

A. Indiana Voter ID Law Anticipates Use Of REAL ID To Establish Voter Eligibility

Under Indiana statutes, with few exceptions, registered voters must present a current federal or state government-issued photo ID document in order to vote in person, IND. CODE § 3-5-5-40.5. The parties have agreed such a document would likely be either an Indiana driver's license or identification card. (Decision of the district court below was reported at 458 F.Supp.2d 775, 789 (S.D. Ind. 2006).) Indiana already has begun to implement the REAL ID system in its Bureau of Motor Vehicles ("BMV"), and the state anticipates the use of REAL ID to establish voter eligibility and identification.

Even though final regulations for REAL ID have yet to be released from the U.S. Department of Homeland Security ("DHS"), Indiana began implementing changes in July. State legislation effective July 1, 2007 makes changes to state driver's license and ID card requirements to "help[] prepare the state for compliance with the federal Real ID Act." Press Release, Ind. Bureau of Motor Vehicles, New requirements await BMV customers (July 2, 2007).[15]

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[15] *Available at* http://www.in.gov/newsroom.htm?detailContent=93_9514.htm.

B. Real ID System Is A Flawed System That Will Prevent Voting By Eligible Individuals

The REAL ID Act of 2005 and the draft regulations promulgated by DHS create a fundamentally flawed national identification system that will not improve the security of Indiana's voter identification system. Integrating Indiana's voter system with REAL ID will make it easier to commit identification theft while preventing eligible individuals from exercising their right to vote.

1. REAL ID Is A Multi-Purpose Identity Document; Denial Of Eligibility For One Purpose (Driving) Could Lead To Denial For Unrelated Purposes (Voting)

In order for a voting system of identification to have any chance of working—the process of authentication must rely on the same data set as the registration information. The State's task is to perfectly identify each qualified voter who will be allowed, if they so choose, to vote in a federal election to do so, while at the same time barring participation by those who are not approved to register and vote. In the case of Indiana's voter identification system the registration data and the authentication data are from two different systems of records.

One system of records whose information was collected and retained for one purpose cannot be successfully used by a completely different system for authentication purposes because it would fail

that test. The state's motor vehicle records, US passport, military IDs, or state-issued university identification documents will not match one another or the voting records for many reasons: people do not input the same information for identification documents, middle initials and names may be omitted, address information may be incomplete, clothes and hair styles in an ID picture may change. Assuming uniformity with out adequate grounds for the assumption will lead to errors in the system of identification.

As currently proposed, the federally mandated REAL ID document, based on the state drivers license, will be used for a variety of purposes, including access to federal office buildings or travel on commercial aircraft. Dep't of Homeland Sec., *Notice of Proposed Rulemaking: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*, 72 Fed. Reg. 10,819, 10,846 (Mar. 9, 2007) ("REAL ID Draft Regulations").[16]

2. Verification Process Is Not Transparent And Document Is Difficult To Obtain

Under the federal REAL ID Act, states are required to obtain and verify documents from applicants that establish: (1) applicant's identity, through a photo identity document, or a non-photo identity document that includes full legal name and date of birth if a photo identity document is not available; (2) date of birth; (3) proof of SSN or

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[16] *Available at* http://edocket.access.gpo.gov/2007/07-1009.htm.

ineligibility for an SSN; (4) applicant's address of principal residence; and (5) lawful status in the United States. Making Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 202, 119 Stat 231, 312-15 (codified in relevant part in 49 USCS §30301 note (2005) ("REAL ID Act"). Under the draft regulations, the only documents that could be accepted by the states to issue these new identity cards would be: (1) valid unexpired U.S. passport or the proposed passport card under the Western Hemisphere Travel Initiative; (2) certified copy of a birth certificate; (3) consular report of birth abroad; unexpired permanent resident card; unexpired employment authorization document; (4) unexpired foreign passport with valid U.S. visa affixed; (5) U.S. certificate of citizenship; U.S. certificate of naturalization; or (6) REAL ID driver's license or identification card (issued in compliance with the final regulations). REAL ID Draft Regulations at 10,827-28.

There are questions as to whether some citizens could produce these documents, among them Native Americans, victims of natural disasters, domestic violence victims, the homeless, military personnel, or elderly individuals. *See* EPIC and 24 Experts in Privacy and Technology, *Comments on DHS 2006-0030: Notice of Proposed Rulemaking: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes* (May 8, 2007) ("EPIC Expert

Comments on REAL ID").[17] The difficult standards for acceptable identification documents would limit the ability of some individuals to get a REAL ID card, thereby limiting an Indiana resident's ability to vote.

DHS attempted to resolve this problem by allowing the States to voluntarily create an exceptions process for extraordinary circumstances. REAL ID Draft Regulations at 10,852. However, though DHS set minimum standards for data collection, retention and documentation of the transaction, the agency did not set minimum standards for eligibility, length of process, or cost of process for the extraordinary-circumstances exception. EPIC Expert Comments on REAL ID at 13-14; REAL ID Draft Regulations at 10,834. DHS states that persons born before 1935 might not have been issued birth certificates, so they might be eligible for the exceptions process. REAL ID Draft Regulations at 10,822. Otherwise, there is nothing that explains how individuals could prove eligibility, how long the process would take (days, weeks, months or even years), or if they could even afford the cost of the exceptions process.

Another difficulty with the data verification procedures mandated by the draft regulations is that DHS requires states to verify applicant documents and data with the issuing agency, yet relies on non-existing, unavailable or incomplete databases. EPIC Expert Comments on REAL ID at 14; REAL ID Draft Regulations at 10,833.

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[17] *Available at* http://www.epic.org/privacy/id_cards/epic_realid_comments.pdf.

3. There Is An Increased Risk Of Identity Theft With Centralized Identity Management System

The REAL ID draft regulations require a national identification system with a 56-state-and-territory database, which creates enormous security risks. EPIC and others have explained that it decreases security to have a centralized system of identification, one ID card for many purposes, as there will be a substantial amount of harm when the card is compromised.[18]

The REAL ID Act mandates that U.S. states and territories provide each other with electronic access to information contained in their motor vehicle databases and each state database must contain all data fields printed on driver's licenses and ID cards, and driver's histories, including motor vehicle violations, suspensions, and points on licenses. REAL ID Act at §§ 202(d)(12), (d)(13). This huge national database would contain the personal information of 245 million license and ID cardholders—a database that could be accessed at thousands of DMVs across the country.

DHS and some states are seeking to expand the use of the REAL ID system. In the draft regulations, DHS seeks comments on "how DHS could expand [the card's official purposes] to other federal activities." REAL ID Draft Regulations at 10,823. Homeland Security Secretary Michael

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[18] *See Hearing on "Maryland Senate Joint Resolution 5" Before the Judicial Proceedings Comm. of the Md. S.* (Feb. 15, 2007) (statement of Melissa Ngo, Dir., EPIC Identification & Surveillance Project), *available at* http://www.epic.org/privacy/id_cards/ngo_test_021507.pdf.

Chertoff said he envisioned the REAL ID licenses "do[ing] double-duty or triple-duty." Michael Chertoff, Sec'y, Dep't of Homeland Sec., Remarks at the National Emergency Management Association Mid-Year Conference (Feb. 12, 2007). [19] These national identification cards would "be used for a whole host of other purposes where you now have to carry different identification." *Id.*

Arizona, Washington and Vermont are piloting programs to use licenses as border identity documents by adding citizenship designations and wireless radio frequency identification ("RFID") technology chips to the cards.[20] Add to these myriad uses the fact that Indiana seeks to use the national ID card as voter identification.

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[19] *Available at* http://www.dhs.gov/xnews/speeches/sp_1171376113152.shtm.

[20] Hearing on Confronting the Terrorist Threat to the Homeland: Six Years After 9/11 Before the S. Comm. on Homeland Sec. & Governmental Affairs, 110th Cong. (Sept. 10, 2007) (testimony of Michael Chertoff, Sec'y, Dep't of Homeland Sec.), *available at* http://www.dhs.gov/xnews/testimony/testimony_1189515509899.shtm; Press Release, Dep't of Homeland Sec., Department of Homeland Security and the State of Washington Team Up to Advance Western Hemisphere Travel Initiative (Mar. 23, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1174904636223.shtm; Press Release, Dep't of Homeland Sec., Department of Homeland Security and the State of Vermont Team Up to Advance Western Hemisphere Travel Initiative (Aug. 20, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1187646614580.shtm; Press Release, Dep't of Homeland Sec., Department of Homeland Security and the State of Arizona Team Up to Advance Secure ID Initiatives (Aug. 24, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1187969723463.shtm.

A centralized identity management system is bad security. Using a national identification card such as REAL ID would be as if you used one key to open your house, your car, your safe deposit box, your office, and more.[21]

Security expert Bruce Schneier has analyzed the REAL ID system and detailed various problems, such as the fact that though "[w]e can raise the price of forgery, but we can't make it impossible," so evildoers will get fake REAL ID cards. Bruce Schneier, *Real-ID: Costs & Benefits,* BULLETIN OF ATOMIC SCIENTISTS, Mar./Apr. 2007.[22] With REAL ID, the damage that can be done by using a fraudulent national ID card would be significantly higher than with today's state ID cards. A national identification system would divide the United States into two groups: (1) "trusted good guys" who have the national ID card, and (2) "untrusted bad guys" who do not. But, Schneier has pointed out that there is a third category that appears – bad guys who fit the good guy profile who could abuse the system and carry legitimately issued REAL ID cards. *Id.*

Large data breaches affect the confidence and trust of the public. People will recoil from systems that create privacy and security risks for their personal data. We have seen countless security

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[21] *See Meeting on "REAL ID Rulemaking" Before the Data Privacy & Integrity Advisory Comm.*, Dep't of Homeland Sec. (Mar. 21, 2007) (statement of Melissa Ngo, Dir., EPIC Identification & Surveillance Project), *available at* http://www.epic.org/privacy/id_cards/ngo_test_032107.pdf.

[22] *Available at* http://www.schneier.com/blog/archives/2007/01/realid_costs_an.html.

breaches that have left the personal data of tens of millions of Americans vulnerable to misuse. *See* EPIC Expert Comments on REAL ID at 43-46. Recently, almost 46 million credit and debit card numbers were stolen by hackers who accessed the computer systems at TJX Companies over a period of several years, making it the biggest breach of personal data ever reported. TJX Cos., Annual Report (Form 10-K), at 8-10 (Mar. 28, 2007).[23] The security breaches began in July 2005 but weren't discovered until December 2006—the financial data of millions were exposed for 17 months. *Id.* at 7.

A year ago, an information security breach by a Department of Veterans Affairs employee resulted in the theft from his Maryland home of unencrypted data affecting 26.5 million veterans, active-duty personnel, and their family members.[24] A laptop and an external hard drive contained unencrypted data that included millions of Social Security numbers, disability ratings and other personal information. Statement, Dep't of Veterans Affairs, A Statement from the Department of Veterans Affairs (May 22, 2006).[25]

There is another significant security risk, besides that of attacks by unauthorized users, and that is of authorized users abusing their power. *See* EPIC Expert Comments on REAL ID at 45-46. A

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[23] *Available at* http://ir.10kwizard.com/download.php?format=PDF&ipage=4772887&source=187.

[24] For complete details, *see* EPIC, Page on the Veterans Affairs Data Theft, http://www.epic.org/privacy/vatheft/.

[25] *Available at* http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1123.

recent government scandal highlights the dangers associated with massive identification systems. In September, a former Department of Commerce agent was indicted and charged with using the Treasury Enforcement Communications System ("TECS") to stalk a former girlfriend and her family. Press Release, Dep't of Justice, Former Department of Commerce Agent Indicted For Making a False Statement and Exceeding Authorized Access To a Government Database (Sept. 19, 2007).[26] While employed at the Commerce Department, the agent is alleged to have accessed the system at least 163 times during a 10-month period. *Id.* TECS contains "every possible type of information from a variety of Federal, state and local sources," including the FBI's National Criminal Information Center and state motor vehicle records. Dep't of the Treasury, *Notice of Privacy Act System of Records*, 66 Fed. Reg. 52983, 53029 (Oct. 18, 2001).[27]

A 2005 scandal in Florida also highlights risks associated with large database systems, such as the one Indiana seeks to use for voter identification. A woman wrote to a newspaper criticizing a Florida sheriff as being too fat for police work and condemning his agency's use of stun guns. Anthony Colarossi, *FDLE Reviewing Beary's Actions Agency To Determine If Sheriff Misused Database To Write*

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[26] *Available at* http://www.usdoj.gov/usao/can/press/2007/2007_09_19_robinson.indicted.press.html.

[27] *Available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=f:18ocn2.pdf.

Critic, ORLANDO SENTINEL, Apr. 9, 2005, at B01. Orange County Sheriff Kevin Beary ordered staffers to use state driver's license records to find the home address of his critic. The sheriff sent her a letter at her home address instead of responding publicly by sending a rebuttal letter to the editor. *Id.* In a case in Maryland just last year, three people—including a Maryland Motor Vehicle Administration official—were indicted on charges of "conspiring to sell unlawfully produced MVA-issued Maryland identification cards." *Fake ID Cards*, WASH. POST, Mar. 15, 2006, at B02. Such insider misuse and abuse would make it easy to circumvent the security sought by the supporters of the Indiana voter photo ID requirement.

The consumer harm that results from wrongful disclosure of personal data is clear. For the seventh year in a row, identity theft is the No. 1 concern of U.S. consumers, according to the Federal Trade Commission. Fed. Trade Comm'n, *Consumer Fraud and Identity Theft Compliant Data: January—December 2006* (Feb. 7, 2007).[28] Reports show that over 216 million records of U.S. residents have been exposed by security breaches since January 2005. Privacy Rights Clearinghouse, Chronology of Data Breaches.[29]

A centralized system of identification creates a "one-stop shop" for identity thieves. Centralizing authority over personal identity into one database and one card increases both the risk of identity theft as well as the scope of harm when it occurs.

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[28] *Available at* http://www.consumer.gov/sentinel/pubs/Top10Fraud2006.pdf.

[29] http://www.privacyrights.org/ar/ChronDataBreaches.htm.

Indiana's plan to use the REAL ID system for voter photo identification is fundamentally flawed.

4. Current State-Based, Decentralized Voter ID System Is More Robust And Catastrophic Failure Is Less Likely

With the REAL ID national identification system, DHS imposes new requirements on State motor vehicle agencies. Each of the 56 interconnected databases must contain all data fields printed on driver's licenses and ID cards, and driver's histories, including motor vehicle violations, suspensions, and points on licenses. REAL ID Act §§ 202(d)(12); (d)(13). The states are compelled to begin maintaining paper copies or digital images of important identity documents, such as birth certificates or naturalized citizenship papers, for seven to 10 years. REAL ID Draft Regulations at 10,855. This is a significant expansion of the personal data previously reviewed or stored by State motor vehicle agencies.

Currently these documents are kept in a variety of places—the Social Security system, the immigration system, local courthouses—and it takes considerable effort to gather them all together. Under REAL ID, all of these identification documents—concerning, among other things, births, marriages, deaths, immigration, social services—are consolidated into one national database, accessible to at least tens of thousands of government employees nationwide, which would give the federal and state governments greater access than before.

The current state-based, decentralized voter identification system is more robust and catastrophic failure is less likely than with the REAL ID system Indiana plans to use. A system of distributed identification reduces the risks associated with security breaches and the misuse of personal information. For example, a banking PIN number, in conjunction with a bankcard, provides a better authentication system because it is not coupled with a single, immutable consumer identity. If a bankcard and PIN combination is compromised, a new bankcard and PIN number can be issued and the old combination cancelled, limiting the damage done by the compromised data. Drawbacks of such structures, including the possibility for the existence of multiple cards, are currently being addressed by the creation of an identity metasystem in which multiple identities can be loosely coupled within a single secure system. Kim Cameron, *The Laws of Identity*, Identity Weblog, Dec. 9, 2004.[30]

Distributing identity in this way allows for different profiles to be used in different authenticating contexts. New profiles can be created as required within a single identity metasystem. Misuse is therefore limited to the context of the information breached, whether it is a single bank account, online merchant, or medical records. The current decentralized voter ID system is more secure than Indiana's proposed system.

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[30] http://www.identityblog.com/stories/2004/12/09/thelaws-.html.

5. Many States Have Rejected The REAL ID System

Though Indiana seeks to integrate its voter identification system into REAL ID, the state is an outlier. Seventeen states have passed laws going against a new federal ID requirement, and legislation opposing the system has been introduced in 21 other states.[31] Some state lawmakers have gone as far to call this federal effort an attempt to create a "papers-please society." Thomas Frank, *6 States defy law requiring ID cards*, USA TODAY, June 18, 2007.

DHS has continually insisted that the REAL ID is not a national identification system, because states can "choose" not to implement the REAL ID system. However, states are under considerable pressure to implement REAL ID and citizens who fail to carry the new identity document will find it impossible to pursue many routine activities.

DHS Secretary Michael Chertoff has said that although REAL ID s not a mandate, states would be punished for non-compliance. He said that citizens in states that do not implement REAL ID would not be able to use their state-issued ID cards for federal purposes, such as entering courthouses or flying domestically. *Id.* Press Release, Dep't of Homeland Sec., Remarks by Homeland Security Secretary Michael Chertoff and New York Governor Eliot Spitzer on Secure Ids (Oct. 27,

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[31] For more on anti-REAL ID legislation in the states, *see generally*, EPIC, National ID Cards and REAL ID Act, http://www.epic.org/privacy/id_cards/.

2007).[32] This means that citizens in these states would use passports, which currently cost $97 each, and the State Department admitted in June that there is a significant backlog in processing passports because of, among other things, "miscalculation" in preparing for implementation of the Western Hemisphere Travel Initiative ("WHTI"). *Hearing on the Passport Backlog and the State Department's Response to the Western Hemisphere Travel Initiative Before the S. Comm. on Foreign Relations*, 110th Cong. (June 19, 2007) (testimony of Maura Harty, Ass't Sec'y for Consular Affairs, Dep't of State). The "miscalculation" was so severe that the Department of Homeland Security had to delay implementation of WHTI from January 2007 until September 2007. *Id.*

The poor planning and miscalculations for WHTI implementation could be a harbinger of REAL ID implementation. Even DHS has had to admit that there are massive problems with the REAL ID system. The final regulations, originally to be released in September, have yet to be published. The original deadline for REAL ID implementation was May 2008. In March, however, DHS pushed the deadline to 2013. REAL ID Draft Regulations at 10,822. Now DHS is considering delaying implementation until 2018, a decade beyond the original deadline. Spencer S. Hsu, *Homeland Security Retreats From Facets of 'Real ID,'* WASH. POST, Nov. 4, 2007, at A07. A DHS official reportedly said REAL ID's cost should be cut by "billions of dollars" as DHS eases previous

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[32] *Available at* http://www.dhs.gov/xnews/releases/pr_1193719117502.shtm.

requirements that REAL ID-compliant licenses "be renewed every five years, that expensive, tamper-resistant materials be used to create the ID cards, and that each state develop its own document verification systems." *Id.*

Critics of REAL ID have been labeled anti-security. In Congressional testimony, a high-ranking DHS official said, "Any State or territory that does not comply increases the risk for the rest of the Nation." *Hearing on Understanding the Realities of REAL ID: A Review of Efforts to Secure Drivers' Licenses and Identification Cards Before the Subcomm. on Oversight of Gov't Management, the Federal Workforce & the District of Columbia, S. Comm. on Homeland Sec. & Governmental Affairs*, 110th Cong. (Mar. 26, 2007) (testimony of Richard C. Barth, Ass't Sec'y for Policy Dev., Dep't of Homeland Sec.).[33] It is not anti-security to reject a national identification system that does not add to our security protections, but in fact makes us weaker as a nation. Indiana's choice to integrate its voter identification system with this fundamentally flawed national identification system would harm its interest in increasing voter identification security.

CONCLUSION

Not only has the state failed to establish the need for the voter identification law or to address the disparate impact of the law, the state's voter ID system is imperfect, and relies on a flawed federal identification system.

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[33] *Available at* http://hsgac.senate.gov/_files/Testimonybarth.pdf.

Amici EPIC respectfully requests this Court to grant Petitioner's motion to reverse the decision of the lower court.

Dated: November 13, 2007

Respectfully submitted,

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